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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-629

THE NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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HOWARD LAW REPORTING AND PUBLISHING CO., Columbus, Ohio

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ROBERT J. KOSYDAR,
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JURISDICTIONAL STATEMENT

Appellant, Robert J. Kosydar, Tax Commissioner of Ohio, appeals from the judgment of the Supreme Court of Ohio entered on July 11, 1973, rehearing denied September 6, 1973. The 5-2 decision of the Ohio Supreme Court prohibits the Tax Commissioner of Ohio from imposing a personal property tax assessment against certain property of the National Cash Register Company in Ohio, as the Commissioner is directed to do under the existing tax statutes of Ohio and as he is permitted to do under the decisions of the United States Supreme Court dating back to 1886. The Tax Commissioner of Ohio

submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 35 Ohio St. 2d 166, 298 N.E. 2d 559 (1973), and is attached as Appendix A. The order of the Court denying the Tax Commissioner's Motion for Rehearing is unreported and a copy is attached as Appendix B. The intermediate decision of the Ohio Board of Tax Appeals is unreported and a copy of that decision is attached as Appendix C. The primary certificate of assessment of the Tax Commissioner of Ohio is unreported and a copy is attached as Appendix D.

JURISDICTION

(i) In its 1968 Ohio personal property tax return and in all subsequent proceedings, the National Cash Register Company (NCR) contended that the inclusion of certain machines in its manufactured inventory, otherwise subject to Ohio personal property taxation, were immune from taxation as exports under Article I, Section 10, Clause 2 of the United States Constitution — the Import-Export Clause. The Tax Commissioner of Ohio disagreed with this contention and levied personal property taxes upon the machines under the authority given to him by §5709.01 and §5711.13 of the Revised Code of Ohio. Pursuant to §5717.02 of the Revised Code of Ohio, NCR then appealed the assessment to the Ohio Board of Tax Appeals, which affirmed the assessment on May 25, 1972.

(ii) Under the provisions of §5717.04 of the Revised Code of Ohio, appeal from the decision of the Board of Tax Appeals was next taken to the Supreme Court of

Ohio by NCR. The Court rendered its decision on July 11, 1973, reversing the decision of the Board of Tax Appeals. The final judgment of the Supreme Court of Ohio denying the Tax Commissioner's Motion for Rehearing was entered on September 6, 1973. Notice of appeal to the Supreme Court of United States was filed both in the Supreme Court of Ohio and the Ohio Board of Tax Appeals on September 12, 1973, and a copy is attached as Appendix E.

(iii) The statutory provision which confers jurisdiction of the appeal upon this Court is 28 U.S.C.A. §1257(2).

(iv) The following cases sustain the jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Ohio on direct appeal on this case:

Coe v. *Errol*, 116 U.S. 517 (1886); *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949).

(v) The sections of the Revised Code of Ohio which direct the Tax Commissioner to assess personal property for taxation are §5709.01 and §5711.13, attached as Appendix F. The portion of the United States Constitution by which NCR denies their applicability is contained in Article I, Section 10, Clause 2:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports and Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

QUESTION PRESENTED

When does the exemption from taxation provided in the Import-Export Clause of the United State Constitution attach to property otherwise taxable under the laws of the State of Ohio?

STATEMENT OF THE CASE

The National Cash Register Company has its world headquarters, main production facility, and warehouse in Dayton, Ohio. For many years it has engaged in the manufacture of cash registers, accounting machines, and electronic data processing systems which it markets throughout the United States and in many foreign countries.

The items involved in this case were of such kind, finished, crated, and in storage awaiting foreign shipment in the Dayton warehouse on December 31, 1967, when personal property tax was assessed against them. As of that date

> ". . . they were simply stored awaiting shipment—title and possession was in [NCR], payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of [NCR]; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. . . ."
>
> *National Cash Register Co.* v. *Kosydar*, 35 Ohio St. 2d 166, 175; 298 N.E. 2d 564, 565 (1973) (O'Neill, C. J. dissenting). Appendix A, at 24, 25.

Nevertheless, and essentially on the grounds that the machines produced for export were built only to order and to foreign specifications, NCR appealed the Tax Commissioner's assessment to the Ohio Board of Tax Appeals. NCR's notice of appeal stated that since the machines were manufactured solely for export, the assessment was ". . . in violation of Article I, §10, Clause 2, of the Constitution of the United States."

The Ohio Board of Tax Appeals, with little comment, affirmed the assessment of tax. It based its decision on all of the federal and most of the state decisions bearing upon the Import-Export Clause—nearly one hundred years of precedent including at least five decisions of the Supreme Court of the United States (*supra*, at 3)—prescribing two criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

> "(1) the property must have started on its journey to a foreign destination
>
> "(2) the property must be irrevocably committed to export". (Appendix C, at 33)

Further, the Ohio Board of Tax Appeals found that while there appeared to be many variables pertaining to *when* the movement contemplated in number (1) above begins, nowhere was it said that the second test alone, as advocated by NCR, was sufficient.

NCR appealed that decision to the Supreme Court of Ohio. Again, but more specifically, the same issue was raised, "[are] goods, certain to be exported, whether or not their transportation has been commenced, . . . immune from state taxation by reason of Article I, Section 10, Clause 2 of the Constitution of the United States of America." (*Brief for Appellant* before the Supreme Court of Ohio, at i; Notice of Appeal of Appellant).

The Tax Commsisioner again argued the position which was presented to and adopted by the Ohio Board of Tax Appeals — certainty export alone is not sufficient to grant immunity from state taxation. Actual movement of property into the stream of export must have commenced.

The Supreme Court of Ohio, however, reversed the decision of the Ohio Board, permitting the "certainty of export" test alone to prevail in Ohio. The Supreme Court relegated the necessity that the journey to a foreign destination be commenced only to situations involving fungible goods.

The Tax Commissioner's Motion for Rehearing before the Supreme Court of Ohio was denied on September 6, 1973. Notice of Appeal to the Supreme Court of the United States was filed both in the Supreme Court of Ohio and the Ohio Board of Tax Appeals on September 12, 1973.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

By its decision, the Supreme Court of Ohio has left the major pillar of the Ohio Tax Commissioner's position uncontroverted either by case law or logic. As found in the leading "export" cases, it is simply that personal property is not immune from state taxation unless it has started on its journey to a foreign destination. *Coe* v. *Errol*, 116 U.S. 517 (1886); *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946); *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949); *Hugo Neu Corp.* v. *County of Los Angeles*, 7 Cal. App. 3d 21, 86 Cal Rptr. 332 (1970); *Rice Growers' Assn. of Cali-*

fornia v. *County of Yolo*, 17 Cal. App. 3d 227, 94 Cal. Rptr. 847 (1971); *Cargill of California* v. *County of Yolo*, 26 Cal. App. 3d 704, 103 Cal. Rptr. 257 (1972).

The case law established by the United States Supreme Court shows the historical development of the test of "what is an export." The first case is *Coe* v. *Errol*, 116 U.S. 517 (1886). There, spruce logs were cut in New Hampshire and placed in a stream to be floated down the Androscoggin River to the State of Maine to be manufactured and sold. The logs were detained in the town of Errol, New Hampshire, by low water and were taxed by the selectmen of Errol in the year 1881. Mr. Justice Bradley said that the "precise question for solution" was:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" (116 U.S. at 525.)

The answer was no, because the spruce logs had not entered the stream of export. The Court stated:

> ". . . nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State." (116 U.S. at 525.)

In a rhetorical question, the Court asked ". . . until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still

remaining a part of the general mass of property in the State?" (116 U.S. at 526.) There was no answer, for the Court decided that the logs were precisely the kind of property subject to state taxation.

The next case, *A. G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), involved a federal tax on baseballs and bats sold by the manufacturer. A Venezuelan firm ordered a New York commission house to buy a quantity of bats and balls for their account. The New York commission house placed the order with Spalding and instructed it to deliver the goods to an exporting carrier in New York for shipment to Venezuela. The goods were delivered to the carrier and an export bill of lading was issued.

Mr. Justice Holmes stated the issue: "[w]hether the sale was a step in exportation . . ." (262 U.S. at 68.) He concluded that exportation had begun:

> "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port.
> ". . . . . ."
> (262 U.S. at 68.)

The requirement that goods must begin their journey before they are exports was reiterated in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946). The taxpayer there was a California refiner and seller of oil, that entered into a contract with the government of New Zealand to deliver oil "f.o.b." Los Angeles. The oil was transported from taxpayer's refinery to the harbor where it was placed in the taxpayer's storage tanks. When a New Zealand ship arrived, the taxpayer pumped the oil from its storage tanks into the hold of the ship. At the same time, the taxpayer received a bill of lading indicating it was the shipper. The tax authorities levied

a tax upon the gross receipts paid to the taxpayer. The Supreme Court of California held that since delivery of the oil marked passage of title, which was the time the tax attached, the transaction was not exempt since export had not begun. The California Supreme Court suggested that if the oil had been placed upon a common carrier rather than on the purchaser's ship, a different result might have occurred (329 U.S. at 74).

On appeal to the United States Supreme Court, California relied upon *A. G. Spalding Co., supra,* as supporting its proposition that delivery to a common carrier marked the start of the export process. In rejecting this contention, the Supreme Court of the United States commented:

> "The certainty that the goods are headed to sea and that the process of exportation has started . . . may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. *It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point.* The means of shipment are unimportant so long as the certainty of the foreign destination is plain."
>
> (329 U.S. at 82-83; emphasis added.)

In 1949, the Supreme Court decided two export cases. In *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949), a Canadian corporation bought gasoline in the United States for export to Canada. The gasoline was shipped by rail to Detroit and was stored in tanks for fifteen months before it was shipped to Canada. A municipal ad valorem tax was assessed on the gasoline.

The Supreme Court found the gasoline not immune from taxation. Mr. Justice Frankfurter explained:

> "The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. . . .
> ". . . . . .
>
> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. . . ." (337 U.S. at 288, 289.)

Finally, *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949), restated the necessity that the journey of exportation must have begun. A cement plant in Merced County, California, was sold to a South American corporation for export. An export license was issued, title passed, and a common carrier was hired to dismantle and package the plant for shipment. The County of Merced levied a personal property tax on the parts of the plant that had not been shipped out of the country.

The Supreme Court upheld the tax levy, stating:

> ". . . it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . *It is the entrance of the articles into the export stream that marks the start of the process of exporta-*

> *tion. Then there is centainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."*
> (337 U.S. at 156-157; emphasis added.)

Thus, the United States Supreme Court has extended the protection of the Import-Export Clause *only* to those goods which have been irrevocably committed to the export stream. In *Coe* v. *Errol*, the spruce logs had not started upon their ultimate passage to another state. In *A. G. Spalding*, delivery of packages to an exporting carrier for shipment granted immunity from state taxation. In *Richfield Oil Corp.*, the state retail sales tax was void because the oil had been delivered into the hold of the vessel which took it to New Zealand. In *Joy Oil*, the fact that the gasoline was eventually to be exported did not render it immune when it was stored for fifteen months. And in *Empresa Siderurgica*, the parts of the cement plant not committed to movement out of the country on tax lien date were not exports.

In NCR's case, its goods were warehoused in Dayton, Ohio. They had not begun their journey. They were not delivered to a carrier when Ohio personal property tax was assessed by the Tax Commissioner. The goods were not in the export stream and were properly subject to Ohio taxation. This was the decision of the Ohio Board of Tax Appeals, which rested solely on its interpretation of the Import-Export Clause, but which was reversed by the Supreme Court of Ohio.

The General Assembly of Ohio, a coequal partner in the government of the state, enacted §5709.01 of the Revised Code of Ohio, which provides that ". . . All personal property located and used in business in this state . . . [is] subject to taxation . . . ." As noted in the dissenting opinion of O'Neill, C. J., below (Appendix A; 35 Ohio

St. 2d 166, 172), the revenue raised by the tax imposed is used in accordance with Ohio law to pay for the local services of government by counties, municipalities, townships, and health districts, including the operation of schools, providing benefit for all the citizens of Ohio, both private and corporate, in the respective local communities.

While NCR would understandably like to be relieved of its share of these state taxes, the only basis upon which is can claim such relief is by a new interpretation of the Import-Export Clause of the United States Constitution. As heretofore noted, that clause has been construed by the United States Supreme Court to grant immunity from state taxation *only* in those cases where the journey to exportation had begun. Unless that interpretation is modified by the Supreme Court of the United States, it must stand as the limit of taxation as much for the State in terms of what it may validly collect and distribute as for its citizens in terms of what must be paid. The Supreme Court of Ohio may no more restrict what the State of Ohio may collect under the federal Import-Export Clause than it may expand an Ohio citizen's tax liability beyond the limits therein described. Yet, in the Ohio Supreme Court opinion dated July 11, 1973, the carefully and consistently developed definition of "export" was swept away.

The question presented is substantial as it represents an unwarranted and significant erosion of the decisions of the Supreme Court of the United States. The consequences of the new definition of export warrant the application of this Court's logic and guidance, not only in terms of the Ohio question, but in terms of all jurisdictions that may subsequently react to the silence of this Court if the federal question is not heard. Therefore,

this case merits plenary review by the Supreme Court of the United States.

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APPENDIX A

THE NATIONAL CASH REGISTER CO., APPELLANT, *v.* KOSYDAR, TAX COMMR., APPELLEE.

[Cite as National Cash Register Co. v. Kosydar (1973), 35 Ohio St. 2d 166.]

Taxation — Tangible personal property — Exemption — Section 10, Article I, Constitution—Prohibition against state tax on exports—Test—Machines designed and built exclusively for foreign consumers—Exempt as "exports."

(No. 72-479—Decided July 11, 1973.)

APPEAL FROM THE BOARD OF TAX APPEALS

This is an appeal by The National Cash Register Company from a decision of the Board of Tax Appeals, the effect of which was the upholding of a tax assessment made by the Tax Commissioner with respect to the company's 1968 inter-county corporation return of taxable property.

In that return, and before the Board of Tax Appeals, National Cash Register (NCR) contended that certain of its machines had, at the time they were included in the company's taxable inventory and their value assessed for tax purposes by the Tax Commissioner, become irrevocably committed to exportation and had commenced the journey which would lead necessarily and undeniably to their exportation from the United States. Therefore, NCR contended, the inclusion of the machines in the taxable inventory pursuant to Ohio personal property law was a violation of Section 10, Clause 2 of Article I of the United States Constitution, the Import-Export Clause.

NCR, a Maryland corporation, has its world headquarters, main production facility and warehouse in Dayton, Ohio. For many years it has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 foreign countries. For marketing purposes, the company is organized into two major divisions, domestic and international, each totally separated from the other. The international marketing division has its own chief executive, a "group vice-president" responsible only to the president of NCR, and its own accounting staff, sales force, product line, and physical facility. With respect to inventory, the division maintains its own record control system and packaging processes for its products.

At the hearing before the Board of Tax Appeals, the international division's vice-president described the general marketing process, as follows:

"* * * The first thing that the salesman would have to do, of course, is to get the customer's interest and secure the permission of the customer to discuss his business with him, with the ultimate objective of being able to make a detailed survey of the customer's business to find out if there was a need for our product.

"Once that need had been established, the salesman would decide how best to take an NCR product * * * and build that product to meet the customer's individual requirements * * *."

He testified further that if an order is placed it is sent to the factory in Dayton, where the product is then manufactured. NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. An order form from a foreign customer will indicate the class of machine and the individual model to be

purchased, the basic construction of the individual machines, the number of machines ordered, their destination, and the terms of the sale. Each order is accompanied by a building instruction sheet, prepared by the individual salesman in the foreign country with the assistance of technical people in that country, which specifies, primarily, the indivdual functions the machines are to peform according to the peculiar commercial and individual requirements of the customer. No order is accepted in Dayton without a building instruction sheet attached to it.

When the order and the building instruction sheet are received by NCR, a factory work order is prepared. The work order contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer. A work order covers every machine manufactured. After a machine has been produced it goes to final inspection for determination that it has been built to specification, and finally is packed and crated to withstand the unusual rigors of export shipment.

The crated machines are then taken to an NCR warehouse in Dayton to await shipment. It was the Tax Commissioner's assessment of the items in that international inventory as of December 31, 1967, tax lien date, which gave rise to this action.

The record reveals that NCR maintains an international inventory for several reasons. Many countries will not allow a partial shipment, so when a large order has been placed and the production cycle is only two or three machines a day, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a system may be produced at several different locations, which also necessitates a con-

solidation prior to shipment. In many instances, NCR is unable to obtain an importation license from the country to which the machines are to be shipped at the time the shipment is ready, even though the country of destination may have agreed to supply one at the time the order was placed. Importation licenses are usually tied to the foreign exchange situation in the particular country, which is often impossible to predict. In one instance, a license was delayed for three years due to a balance-of-payments problem. Related difficulties involve local fluctuations in currency value, availability of foreign currency and unforeseen delays in obtaining letters of credit. The pitfalls in the operation of the international division are numerous, complicated and completely beyond the ability of NCR to predict with any degree of consistency.

The uncontroverted record establishes that no piece of equipment built for the international division has ever gone into any area other than the international division; that there is no recorded instance where a machine sold to a foreign purchaser was returned; and that no exported item has ever found its way back into the United States market. Likewise, it was uncontroverted that due to unique construction and special adaptation for foreign use, machines marketed by the international division were not merely noncompetitive in the United States market, but were not saleable there. The reasons for this include complex technical variations in keyboards, wiring, detents and motors; and, specifically as to cash registers, variations in dispensers, the amount of characters on the keys and in the windows and in the decimal point placement. There was evidence that electrical current varied from country to country, even in parts of the same country, in terms of standard voltage and cycles and, in some instances, as between AC and DC current. There

was also testimony that the degree of merchandising control in the retailing field in the United States was technically superior to that of other countries by ten years, making machines produced for foreign customers obsolete in the domestic market.

Further, an NCR export product could not economically be converted for domestic sale. Against the company's profit margin of approximately five percent per unit, the changeover cost would be approximately 16 percent per unit, rendering the possibility of a changeover totally unfeasible.

Upon the basis of all those factors, NCR urged that the machinery in the international inventory enjoyed an export status and should not be taxed. However, based mainly upon federal cases, the Board of Tax Appeals in its decision said:

"* * * two judicially articulated criteria * * * must exist concurrently for personal property to be exempt from state taxation as an export:

"(1) the property must have started on its journey to a foreign destination

"(2) the property must be irrevocably committed to export."

Unable to find any evidence that NCR had met the first test, or that compliance with the second test alone was enough, the board affirmed the assessment order with respect to the international inventory.

The cause is now before this court pursuant to an appeal as a matter of right by NCR.

Messrs. Dargusch & Day and Mr. Roger F. Day, for appellant.

Mr. William J. Brown, attorney general, *Mrs. Maryann B. Gall* and *Mr. Peter Stratigos*, for appellee.

PER CURIAM

Section 10, Clause 2 of Article I of the United States Constitution provides: "No state shall, without the consent of the Congress lay any imposts or duties on imports or exports * * *." This case requires us to determine whether the machines in NCR's international inventory, which were assessed by the Tax Commissioner, were "exports" within the meaning of that clause.

In answering that question, the Board of Tax Appeals applied a mechanistic, two-fold formula which it culled from phrases found in the leading "export" cases. *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of Equalization* (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154; *Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Rptr. 332; *Rice Growers' Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847; *Cargill of California* v. *County of Yolo* (1972), 26 Cal. App. 3d 704, 103 Cal. Rptr. 257. A majority of this court, however, is of the opinion that the instant case is particularly ill-fitted for a mechanical disposition.

The cases from which the two criteria for immunity from taxation were extrapolated by the board embraced products which were completely fungible or were viewed as such. In that situation, we can agree that nothing less than delivery to a carrier, marking the commencement of movement in the export stream, will suffice to guarantee that the process of exportation has been irreversibly initiated. This case, on the other hand, involves cash registers, accounting machines, and electronic data processing systems which have been ordered, designed and built exclusively to serve the peculiar needs of specific

foreign consumers. It is uncontradicted on the record that, in every material respect, the machines involved herein are useless in the domestic market and never find their way there. Of all the cases examined, we were unable to find any situation where the "certainty of export" has been more clearly demonstrated than in this case*; the degree of certainty here exemplified is fully equivalent to that which attends the delivery of fungible goods to a carrier for the start of a journey to a foreign destination.

The decision of the Board of Tax Appeals is reversed, except as to that portion of the assessment which relates to items destined for sale in the possessions or territories of the United States. As to such latter assessment, the decision of the board is affirmed.

DECISION REVERSED IN PART AND AFFIRMED IN PART

HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ., concur.

O'NEILL, C. J., and P. BROWN, J., dissent.

O'NEILL, C. J., dissenting. I dissent on authority of R. C. 5709.01 and the cases decided by the United States Supreme Court involving Section 10, Clause 2 of Article I of the United States Constitution. See *Coe* v. *Errol* (1886), 116 U. S. 517; *A. G. Spalding & Bros.* v. *Edwards* (1923), 262 U. S. 66; *Richfield Oil Corp.* v. *State Board of*

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*Of perhaps equal certainty was the DDT in *Montrose Chemical Corp.* v. *County of Los Angeles* (1966), 243 Cal. App. 2d 300, 52 Cal. Rptr. 209 (cert. den. 386 U.S. 1004). But, see, *Rice Grower's Assn. of California* v. *County of Yolo* (1971), 17 Cal. App. 3d 227, 94 Cal. Rptr. 847.

Equalization (1946), 329 U. S. 69; *Joy Oil Co.* v. *State Tax Commission* (1949), 337 U. S. 286; *Empresa Siderurgica* v. *County of Merced* (1949), 337 U. S. 154.

R. C. 5709.01 provides, in pertinent part:

"* * * *All personal property located* and used in business *in this state* * * * [is] *subject to taxation* * * *." (Emphasis added.)

This tax applies to all property manufactured to order and "then taken to * * * [a] warehouse * * * to await shipment," whether that shipment is to be made to Columbus, Buffalo, San Francisco, or a foreign country.

The revenue raised by the tax imposed upon this property is used in accordance with law to pay for the local services of government by counties, municipalties, townships and health districts and for the operation of schools provided for the benefit of all private and corporate businesses and the citizens of the local communities in which those businesses are located.

The appellant in this case understandably would like to be relieved of its share of the taxes for the support of schools and local government upon its inventory awaiting shipment. Appellant contends that it is in a different position from all other manufacturers of products for both domestic and foreign shipment.

The only basis on which the appellant can claim immunity from this tax on its personal property inventory "stored prior to shipment" or "taken to an NCR warehouse in Dayton to await shipment" is that the tax imposed by the General Assembly of Ohio upon all personal property is unconstitutional under the provisions of Section 10, Clause 2 of Article I of the United States Constitution as to appellant's property, even though it is valid as to all other manufacturers' property awaiting shipment in warehouses.

No case decided by the United States Supreme Court supports appellant's position. In my opinion, it is easy to determine why this is true.

The sole issue in this case is: When does the exemption from taxation provided in the export-import clause of the United States Constitution attach to the goods?

The controlling rule of law in this regard is succinctly stated by Mr. Justice Frankfurter in *Joy Oil Co.* v. *State Tax Comm.* (1949), 337 U. S. 286, at page 288, as follows:

"The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services. See *Coe* v. *Errol*, 116 U. S. 517, 527-28."

As Justice Frankfurter said in *Joy Oil Co., supra*:

"The circumstances which tended, at the time when the tax was assessed, to establish petitioner's intent to export the gasoline and the fact that the gasoline was eventually exported are not enough, by themselves, to confer immunity from local taxation. See, *e. g.*, *Cornell* v. *Coyne*, 192 U. S. 418; *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154."

So in the instant case, the circumstances which tended, at the time the tax was assessed, to establish (1) petitioner's intent to export, (2) the certainty of export if a profit was to be made from the manufacture of the property, and (3) the fact that all similar property manufactured by the company in the past had been exported eventually are not enough, by themselves, to confer immunity from local taxation.

The appellant places emphasis upon the argument that many of the United States Supreme Court cases holding goods not immune from local taxes have so held because

of possible diversion of the goods to the domestic market. It is asserted that those cases involved fungible goods, while the machines in the instant case, because of their character, were not saleable in the domestic market, were not fungible, and were not divertible, and, therefore, should be exempt from local taxation. Such a fungible-goods argument may have some validity once the process of exportation has started and the exemption has attached to the goods. Then and only then, under the cases, does the question arise as to the certainty of the goods completing the process and reaching the foreign destination as against the possibility of being diverted to the domestic market. See, *e. g., Joy Oil Co., supra; Empresa Siderurgica, supra.* However, the fungible-goods argument is not relevant to the question presented in the instant case.

The factual question of fungible or nonfungible goods plays no part in a determination of when the process of exportation begins, *i. e.*, when the exemption initially attaches. See *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66.

The intent to export clearly is not sufficient to commence that process and change a machine stored awaiting shipment into an export. *E. g., Joy Oil Co., supra.* The certainty of export is not sufficient to convert property in a warehouse awaiting shipment to an export. *Empresa Siderurgica, supra* (cement plant parts crated awaiting shipment overseas held not exports and not immune from local taxes). The fact that the machines were made to order for a foreign market or that such machines have always been shipped overseas eventually does not make a product stored in a warehouse awaiting shipment an export exempt from taxation. *Cf. Coe* v. *Errol, supra; Hugo Neu Corp.* v. *County of Los Angeles* (1970), 7 Cal. App. 3d 21, 86 Cal. Reptr. 332.

If the above were true, the argument could be made with equal logic and force that all property stored in the factory awaiting manufacture of a machine, or certainly all property in process of manufacture into a machine, is exempt. No doubt the General Assembly could exempt such property from local taxes for local services, but it has not done so.

Argument is advanced by the appellant, in brief, that a change in the law extending the exemption from taxes would serve a useful purpose with regard to national monetary or trade policy. For this court to ground its decision upon such unexpressed reasons is contrary to the settled law that acts of the General Assembly are presumed to be constitutional unless clearly in violation of constitutional provisions. R. C. 1.47(A); *State, ex rel. Dickman,* v. *Defenbacher* (1955), 164 Ohio St. 142, 128 N. E. 2d 59.

The machines in this case meet the requirement of goods destined for foreign commerce. They were ordered by a foreign customer. Once the process of exportation is commenced, a persuasive argument could be made that they are certain to be exported and, therefore, exempt.

However, at the time the tax was assessed the exemption had not attached to the articles as required by law because they were simply stored awaiting shipment—title and possession was in the appellant, payment had not been made, no export license issued, no letter of credit authorized, and the machines were in complete control of appellant; but, most important, there was no movement of goods, no shipment, no process of exportation. There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue,

the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment. They were not an export exempt from local taxes until they moved—in plain language, until they were shipped or at least moved to or into a means of transportation. *Empresa Siderurgica* v. *County of Merced, supra; Joy Oil Co., supra.*

The objection is made that this is a "mechanistic" concept. (See dissenting opinion in *Empresa Siderurgica, supra.*) I can not agree. The court has held that the exemption attaches to the articles or the goods. The time at which it attaches must be established. *A G. Spalding & Bros.* v. *Edwards, supra.* The rule expressed by the majority fails to deal with this fundamental question. It leaves vague and unanswered the real question in the case which is: At what point did the machines become "exports" exempt under the Export-Import Clause?

P. BROWN, J., concurs in the foregoing dissenting opinion.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
) **1973 TERM**
City of Columbus.) **To wit: September 6, 1973**

NATIONAL CASH REGISTER CO.,

Appellant,

vs.

ROBERT J. KOSYDAR, TAX COMMR.,

Appellee.

No. 72-479

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____Page_____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 6th day of September, 1973.

THOMAS L. STARTZMAN, *Clerk.*

*By*_____*Deputy.*

APPENDIX C

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE NATIONAL CASH REGISTER COMPANY
Main and K Streets
Dayton, Ohio 45409

Appellant

vs.

ROBERT J. KOSYDAR
Tax Commissioner of Ohio

Appellee

No. 71-02-0330

PERSONAL PROPERTY TAX

(Tangible)

APPEARANCES: For the Appellant:

Dargusch and Day
by L. Orin Slagle, Jr.
and Roger Day
218 East State Street
Columbus, Ohio 43215

For the Appellee:

William J. Brown,
Attorney General
by Peter Stratigos, Assistant
State House Annex
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above named appellant under date of February 23, 1971, from a final assessment certificate of valuation on Inter County Corporation Tangible Personal Property dated January 29, 1971, for the tax return year 1968, in which a deficiency of $1,477,700 is shown for Dayton Taxing District, Montgomery County, Ohio.

Appellant filed its notice of appeal from said assessment and in pertinent part said notice reads as follows:

> "Pursuant to Section 5715.02, of the Revised Code of Ohio, The National Cash Register Company, hereinafter "NCR", gives notice of its appeal to the Board of Tax Appeals, from a Final Assessment Certificate of Valuation for Montgomery County, issued with respect to Ohio Personal Property tax return year 1968, and bearing the date of January 29, 1971. A true and correct copy of the Certificate is attached hereto, made a part hereof, and incorporated by specific reference. Such Certificate is erroneous, in that it:
>
> (1) Disallows a claim for reduction from Schedule 3, of idle, obsolete and unsaleable inventory (identified as Account No. 322530). Such inventory consists of used machinery, originally manufactured by NCR, and subsequently returned to it for various reasons. The Tax Commissioner erred by assessing such inventory in excess of its true value in money. See Section 5711.18 of the Revised Code of Ohio.
>
> (2) Disallows a claim for reduction from Schedule 3, of inventory held for export. Such inventory consists of new machines, manufactured by NCR solely for export. The Tax Commissioner erred by assessing such inventory in violation of Article I, §10, Clause 2, of the Constitution of the United States.

Because of the errors stated above, NCR requests that the Commissioner's determinations be reversed as unreasonable and unlawful, and that final judgment be entered in its favor."

At the hearing before the Board of Tax Appeals, appellant abandoned its claim under item (1) of its notice of appeal leaving only the item (2) in contention. Both items 1 and 2 began as claims for deduction from book value in which the claim for deduction for export inventory which was added back by the agent for the Tax Commissioner amounted to $2,159,035 at 50% listed value for $1,079,520.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the testimony and evidence presented to the Board of Tax Appeals at a hearing in Columbus, Ohio, on August 5, 1971, and the briefs supplied by counsel.

For many years, the appellant has engaged in the manufacture of cash registers, accounting machines and electronic data processing systems, which it markets throughout the United States and in 120 countries abroad. Its home offices, main producing facility and warehouse are located in Dayton, Ohio. In marketing its products, NCR has two Main divisions. One is known as domestic marketing and the other is known as international marketing. Although the two divisions are not separately incorporated, there is total separation of the international operation of NCR from its domestic operations. Each division is headed up by a group Vice President, who reports directly to the President of the company. Each is housed in a separate facility and has its own accounting staff and sales force. With respect to inventory, each division has its own record control system and products that

are packaged for export from the plant or warehouse have identifiable packaging from products packaged for domestic delivery.

The only inventories of items destined for exportation, which NCR maintained in Ohio in 1967 were located in Dayton, Ohio. These inventories consisted of cash registers, accounting machines and electronic data processing equipment, all of which had been contracted for purchase by foreign buyers prior to manufacture.

Each machine is custom built to accommodate commercial peculiarities of the particular country to which it is to be shipped and of the individual consumer.

The ultimate objective of an NCR salesman when calling on a foreign customer is to determine from a detailed survey of the customer's business if there is any need for an NCR product. Once a need has been established, the salesman decides how best to build an NCR product to meet the customer's individual requirements in that foreign country.

If an order is placed, it is sent to the factory at Dayton, Ohio, where the product is custom-built for the foreign buyer. NCR has no inventory of products already constructed to meet an order when it arrives at Dayton.

Each order is accompanied by a building instruction sheet when it arrives at Dayton on which is a model number followed by a series of numbers. The model number indicates the country to which the product is to be shipped and the following series of numbers describes in code the individual functions the machine is to perform. The building instructions sheet is prepared by the individual salesman in the foreign country with the assistance of technical people in that country. No order can be accepted by NCR without this sheet.

When a foreign order along with the necessary accom-

panying documents is received by NCR, a factory work order card is prepared. This card contains the necessary production language to enable the factory to build the machine to the exact specifications of the customer.

After a machine has been produced pursuant to the customer's specifications, it goes to final inspection for determination that it, in fact, has been built as specified on the factory work order card. The machine is then packed for export shipment.

Machines packed for export shipment are readily distinguished from those packed for domestic shipment. Most of the equipment sold in the United States is packaged in cardboard boxes; however, export equipment is sealed in very heavy plastic moistureproof covers and packed in wood crates, which are reinforced by wire bands and steel straps. In addition, the machine's foreign destination is stenciled on the side of the crate.

The crated machines are then taken to an NCR warehouse to await shipment. In 1967, the international inventory was housed in Dayton, Ohio. There are several reasons why NCR maintains an international inventory. Many countries will not allow a partial shipment or, often a country has a balance-of-payments problem and will not issue an import license until a later date. In other cases, a letter of credit may be held up or necessary transportation may not be available.

It was the opinion of appellant's witness that due to their unique construction and special adaptation for foreign use, these machines are not salesable domestically, that an item destined for an export customer and exported by NCR never finds its way back into the United States. NCR has had no machine sold to a foreign purchaser which has been returned.

The testimony was that a cash register destined to be exported to Japan, for example, would not be saleable in the United States. The keyboard is used to record yen, rather than dollars. The decimal point is after the third column, rather than the second. Because there are 350 yen to a dollar, the machine is capable to recording a transaction of 99,999,999 and that a machine with such a high capacity has no application in this country. Furthermore, the keys, printing mechanism, and indicators appearing in the window are in Chinese characters. The motor and electrical system is designed specifically for Japan. Japan uses 100 volt current, whereas 110-120 is standard in the United States. If a machine designed for Japan were plugged into U. S. current, the motor would ultimately burn out. Many machines exported to Japan are designed to run on 50 rather than the 60 cycle current employed in the United States. If a machine designed to run on 50 cycle current were plugged into a current with 60 cycles, you would get a slow operation, which would make the machine add wrong because of the change in cycling time. The same is true of all NCR export products including accounting machines and electronic data processing systems.

Many machines are equipped for special functions such as automatic change making. Such a mechanism will not operate in the United States because the attached dispenser is denominated for foreign coins, which are entirely different from the denomination of coins in this country.

The testimony was that more than the mere mechanics makes an export machine unsaleable in the United States. In the United States and in the retailing field, the marketing philosophy is different from that in most countries throughout the world. The techniques here are perhaps

ten years ahead of most countries in Europe at the moment. For example, many domestic consumers demand automatic reorder systems, which feed data from the cash register into a computer network. These systems would be unavailable on export models.

The testimony further was that an NCR export product could not *economically* be converted by NCR for sale domestically. Such conversion would require the machine to be sold at a price which could not be competitive with a machine that was originally manufactured and produced for domestic consumption.

The United States Constitution, Article I, Section 10, Clause 2 provides that:

> "No State shall without the consent of Congress, lay any Imports or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws ***"

The tax herein involved is an ad valorem tax levied upon all personal property located and used in business in this state.

The very able briefs filed by counsel discuss at length the elements necessary for personal property to acquire the status of an export. Many cases are cited and considered but all are other than Ohio cases. Most are Federal cases and through all of these cases run two judicially articulated criteria which must exist concurrently for personal property to be exempt from state taxation as an export:

(1) the property must have started on its journey to a foreign destination

(2) the property must be irrevocably committed to export.

It is appellant's contention that actually only the second is necessary but that if the first is required then its movement to its warehouse is sufficient.

With this the Board of Tax Appeals does not agree. From a careful study of the cases cited it is clear that there are many variables considered by the Courts as to when the movement begins but nowhere is it said that the second test alone is sufficient.

Giving consideration to the facts, the case law, the constitutions, statutes and the very able briefs and arguments of counsel, it is the decision of the Board of Tax Appeals that the final assessment certificate of valuation herein must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken, with respect to the above matter.

ARTHUR W. MOORE, Secretary

STATE OF OHIO
DEPARTMENT OF TAXATION

INTER-COUNTY CORPORATION
TANGIBLE PERSONAL PROPERTY

PRESCRIBED TAX FORM NO. 947-F

TAXPAYER'S NAME

NATIONAL CASH REGISTER COMPANY
MAIN & K STREETS
DAYTON, OHIO 45409

ACCOUNT NUMBER	DATE	RETURN YE/
6739575	1/29/71	1968.

FINAL ASSESSMENT CERTIFICATE OF VALUATION

TO THE AUDITOR - This is to certify that the Tax Commissioner has, pursuant to Sec. 5711.26, R.C., fixed the FINAL assessed value of tangible personal property of this company and apportioned it to your county as set forth below.

CO.	TAXING DISTRICT	TOTAL FINAL ASSESSED VALUE	TOTAL PREVIOUSLY ASSESSED VALUE	DEFICIENCY	PENALTY AND ADD. CHARGES	TOTAL DEFICIENCY	EXCESS
57	DAYTON	78,014,300	76,536,600	1,477,700		1,477,700	

PER FINDINGS OF FIELD AUDIT
CLAIM FOR DEDUCTION ALLOWED IN PART
THIS FINAL ASSESSMENT AUTHORIZED BY THE TAX COMMISSIONER ON JANUARY 29, 1971
AMENDS ASSESSMENT OF AUGUST 7, 1968

ALL OTHER VALUES PREVIOUSLY ASSESSED REMAIN UNCHANGED

NOTICE TO TAXPAYER - In the event of any objection to any deficiency or excess, Petition on Appeal (Sec. 5717.02 R.C.) must be filed with the Board of Tax Appeals within thirty days after mailing of this notice. Remit to County Treasurer upon receipt of bill based on values above.

Robert J. Kegler
TAX COMMISSIONER

TAXPAYER'S COPY

APPENDIX D

APPENDIX E

IN THE SUPREME COURT OF OHIO

Appeal From the Board of Tax Appeals

NATIONAL CASH REGISTER CO.,
Appellee,

vs.

ROBERT J. KOSYDAR, TAX COMMISSIONER OF OHIO,
Appellant.

Case No. 72-479

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice hereby is given that Robert J. Kosydar, Tax Commissioner of Ohio, the appellant above-named, appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio, entered September 6, 1973, denying appellant's motion for rehearing and thereby affirming judgment for appellee entered pursuant to its opinion of July 11, 1973.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

WILLIAM J. BROWN
Attorney General of Ohio
Counsel for Appellant
ROBERT J. KOSYDAR
Tax Commissioner of Ohio

DWIGHT C. PETTAY, JR.
Assistant Attorney General
MARYANN B. GALL
Assistant Attorney General

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

Maryann B. Gall, Assistant Attorney General, being first duly sworn, deposes and says she is Counsel for Robert J. Kosydar, Tax Commissioner of Ohio, appellant herein; that she did, on the 12th day of September, 1973, serve a copy of the within Notice of Appeal upon Roger F. Day, Counsel for National Cash Register Co., appellee herein, by delivery of the same personally to him at his office, Columbus, Ohio, in conformity with Rule 33 (3) (C) of the Rules of the Supreme Court of the Supreme Court of the United States; and that all parties required to be served have been served.

MARYANN B. GALL

Sworn to before me and subscribed in my presence at Columbus, Ohio, this 12th day of September, 1973.

JOHN S. DUFFY, JR.
Attorney at Law
Notary Public
State of Ohio

APPENDIX F

5709.01 Taxable property entered on general tax list and duplicate.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

5711.13 Corporation shall make combined return; assessment; certification to auditor of state.

A corporation having taxable property required to be listed in more than one county shall make a combined return to the tax commissioner listing all its taxable property in this state, in conformity with sections 5711.01 to 5711.36, inclusive, of the Revised Code, but it shall not assign its property of the kinds mentioned in section 5709.02 of the Revised Code to any particular taxing district or county. The commissioner shall assess the per-

sonal property of such corporation in the several taxing districts in which it is required by sections 5711.01 to 5711.36, inclusive, of the Revised Code, to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by section 5711.25 of the Revised Code. All other property of such corporation required to be so listed shall be entered on the intangible property tax list in the office of the auditor of state and the duplicate thereof in the office of the treasurer of state and taxed under section 5707.03 of the Revised Code. The commissioner shall assess all other property of each corporation, and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind thereof to the auditor of state, who shall enter same on the intangible property tax list in his office in the manner provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code. Sections 5711.01 to 5711.36, inclusive, of the Revised Code, shall apply to and govern such corporation, its proper officers and representatives, the commissioner, and the county auditor as to all proceedings in the assessment of the property of such corporation.

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Maryann B. Gall, Assistant Attorney General, being first duly sworn, deposes and says she is Counsel for Robert J. Kosydar, Tax Commissioner of Ohio, appellant herein; that she did, on the ___ day of October, 1973, serve three copies of the Jurisdictional Statement upon Roger F. Day, Counsel for the National Cash Register Company, appellee herein, by delivery of the same personally to him at his office in Columbus, Ohio, in conformity with Rule 33(3)(C) of the Rules of the Supreme Court of the United States; and that all parties required to be served have been served.

MARYANN B. GALL

Sworn to before me and subscribed in my presence at Columbus, Ohio, this ___ day of October, 1973.

JOHN C. DUFFY, JR.
Attorney at Law
Notary Public, State of Ohio